

Amendments to Senate Bill No. 465
1st Reading Copy

Requested by Senator Bradley Hamlett

For the Senate Taxation Committee

Prepared by Greg Petesch
March 20, 2009 (1:31pm)

1. Title, line 10.

Following: "SECTIONS"

Insert: "61-8-371,"

2. Page 1, line 13.

Insert: "WHEREAS, for 120 years since the admission of Montana as a state in 1889, the Department of Revenue and its predecessor agencies have taxed landowners whose property abuts a river or stream on the assumption that each riparian landowner owns the property to the middle of the river or stream; and

WHEREAS, in *Montana v. United States*, 450 U.S. 544 (1981), the United States Supreme Court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the Union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow Reservation; and

WHEREAS, for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984), based upon *The Montello*, 87 U.S. 430 (1874), *Sierra Pacific Power Co. v. Federal Energy Regulatory Commission*, 681 F.2d 1134 (9th Cir. 1982), and *State of Oregon v. Riverfront Protection Association*, 672 F.2d 792 (9th Cir. 1982); and

WHEREAS, beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the Department of Revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage; and

WHEREAS, the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments; and

WHEREAS, procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard; and

WHEREAS, the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiescence in the underlying state ownership claim; and

WHEREAS, the Department of Natural Resources and Conservation has also asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Revenue wishes to use the appeal mechanisms available through the County Tax Appeal Boards and the State Tax Appeal Board to determine whether riverbeds and streambeds are taxable to the abutting riparian landowners, it is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

3. Page 1, line 16.

Following: "property"

Insert: "-- presumption of taxability"

Following: "property."

Insert: "(1)"

4. Page 1.

Following: line 19

Insert: "(2) In the absence of adjudication of the ownership of the bed of any river or stream, it is the policy of the state that the department shall assess all land that is part of the bed and banks of a river or stream to the owner of record of the property."

5. Page 1, lines 28 and 29.

Following: "property of the" on line 28

Insert: "original"

Following: "owner" on line 28

Strike: remainder of line 28 through "built" on line 29

Insert: "or the original owner's successors in interest or assignees"

6. Page 2, line 5.

Insert: "Section 4. Section 61-8-371, MCA, is amended to read:

"61-8-371. Operation of motor vehicle or off-highway vehicle below high-water mark on certain state or federal lands prohibited -- exceptions. (1) Except as provided in 77-1-111(3), 77-1-806(4), and subsections (2) and (3) of this section, a person may not operate a motor vehicle or an off-highway vehicle below the ordinary high-water mark, as defined in 23-2-301, of class I or class II waters, as defined in 23-2-301, that occurs on state or federal lands or below the ordinary high-water mark of class I waters flowing through private lands, within that portion of the streambed that is covered with water.

(2) A motor vehicle or an off-highway vehicle may be operated below the ordinary high-water mark on state or federal lands on an established road or trail that enters or crosses a stream, but the stream crossing must be by the shortest practical or designated route to the road or trail on the opposite bank.

(3) The prohibition in subsection (1) does not apply to:

(a) off-highway or motor vehicle use that occurs on state or federal land that is designated for off-highway or motor vehicle use below the ordinary high-water mark if the use is in accordance with the requirements of the authorization;

(b) off-highway or motor vehicle use conducted on state or federal land pursuant to and in accordance with a specific written authorization from the appropriate land management agency for that use below the ordinary high-water mark; and

(c) operation of an off-highway vehicle by a nonambulatory

person who is using the vehicle for recreational use, as defined in 23-2-301, as long as operation of the vehicle is prudent and minimizes destruction.

(4) The state may authorize the use of a motor vehicle or off-highway vehicle on state property below the ordinary high-water mark only when the state has determined that the use will have a minimal impact on the streambed and on the fish and wildlife ecology of the stream or river. Federal land management agencies are requested to apply the same criteria when authorizing use of federal land."

{ Internal References to 61-8-371: None. }

Renumber: subsequent sections

- END -